

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

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In the Matter of )

Assessment and Collection of )  
Regulatory Fees for Fiscal Year 2006 )

Petition for Rulemaking of )  
VSNL Telecommunications (US) Inc. )

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RM No. 11312

To: Secretary, Federal Communications Commission

**COMMENTS OF FLAG TELECOM GROUP LIMITED  
IN SUPPORT OF PETITION FOR RULEMAKING**

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Dated: March 17, 2006

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**COMMENTS**

Pursuant to Section 1.405 of the rules of the Federal Communications Commission (“*Commission*”),<sup>1</sup> FLAG Telecom Group Limited (“*FLAG*”), by its attorneys, hereby files the instant comments in response to the petition for rulemaking (“*Petition*”) filed by VSNL Telecommunications (US) Inc. (“*VSNL*”).<sup>2</sup> The Petition discusses several flaws with the Commission’s current regulatory fee regime as applied to non-common carrier submarine cable landing licensees (“*NCC Licensees*”) and proposes certain changes to the Commission’s rules governing the assessment of regulatory fees against such licensees.

As set forth below, FLAG agrees with VSNL that the Commission’s current capacity-based international bearer circuit (“*Circuit*”) annual regulatory fee (“*IBC Fee*”) has several critical shortcomings as applied to NCC Licensees. Section 9 of the Communications Act of 1934, as amended (“*Act*”), provides the Commission with ample authority to amend its IBC Fee assessment methodology as applied to NCC Licensees to resolve these shortcomings.<sup>3</sup> In fact, Section 9(b)(3) requires the Commission to make such a change where, as in the instant situation, a rulemaking or change in law has changed the nature of the regulatory services

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<sup>1</sup> 47 C.F.R. § 1.405.

<sup>2</sup> See *Consumer and Governmental Affairs Bureau Reference Information Center Petitions for Rulemaking Filed*, Public Notice, Report No. 2759 (rel. Feb. 15, 2006).

<sup>3</sup> 47 C.F.R. § 159.

provided to payors of the regulatory fees by the Commission such that the fees do not accurately reflect the Commission's costs to regulate such payors.

## **I. THE CURRENT REGULATORY FEE REGIME AS APPLIED TO NON-COMMON CARRIER SUBMARINE CABLE LANDING LICENSEES HAS SEVERAL CRITICAL FLAWS**

Pursuant to Section 9 of the Act, the Commission assesses and collects annual regulatory fees from NCC Licensees based upon the number of activated 64 Kbps Circuits that they operate, excluding Circuits leased to,<sup>4</sup> or used by, Section 214 authorization holders. Specifically, the Commission charges a fixed-fee for each such Circuit calculated by dividing the Commission's projected total cost of regulating providers of Circuits, including Circuits operated by common carrier submarine cable landing licensees and satellite licensees, by the Commission's estimate of the number of activated Circuits.<sup>5</sup> This IBC fee is then indiscriminately imposed on all providers of Circuits regardless of the actual cost of regulating the various categories of Circuit providers. Thus, the same per-Circuit IBC Fee is paid by heavily regulated entities, such as common carriers subject to Title II of the Act and international satellite licensees subject to complex licensing and spectrum regulation and international coordination procedures, and by substantially less regulated NCC Licensees.

The Commission's capacity-based methodology for assessing IBC Fees on Circuits has several significant shortcomings when applied to NCC Licensees. First, the Commission's current IBC Fee regime shifts an increasing percentage of the total IBC Fees collected by the Commission to NCC Licensees, which is especially inappropriate given that the cost of regulating NCC Licensees does not concomitantly increase each year but instead has decreased

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<sup>4</sup> IBC Fees are assessed against all Circuits leased or sold as an indefeasible right of use. For convenience, the term "lease" is used herein to describe both types of commercial arrangements.

<sup>5</sup> See, e.g., *What You Owe—International and Satellite Services Licensees for FY 2005*, Regulatory Fees Fact Sheet (Jul. 1, 2005); *Assessment and Collection of Regulatory Fees for Fiscal Year 2005*, Report and Order and Order on Reconsideration, 20 FCC Rcd 12259, ¶¶ 8-9 (2005).

over time. Second, the Commission's current IBC Fee assessment methodology poses a significant obstacle to the commercial model used by NCC Licensees to lease undersea cable capacity. Finally, the Commission's methodology serves as a disincentive to technology upgrades and new cable deployment by NCC Licensees.

#### **A. Capacity-Based IBC Fees Disproportionately Burden NCC Licensees**

The IBC Fees assessed on NCC Licensees are significantly higher than any reasonable estimate of the actual costs of regulation in direct contravention of Section 9 of the Act, which requires that the revenues collected by the Commission to recover its costs be reasonably regulated to the costs of regulation.<sup>6</sup> As very clearly demonstrated by the Commission's recent circuit status reports,<sup>7</sup> the percentage of all available Circuits carried on undersea cables has consistently increased year-over-year for the past several years<sup>8</sup> and there is no reason to believe that this trend will not continue into the future. Even more importantly, the percentage of all

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<sup>6</sup> 47 C.F.R. § 159(b)(1).

<sup>7</sup> As noted by the Commission in its most recent circuit status report, its circuit data is incomplete in part because NCC Licensees and foreign entities that hold interests in submarine cables but do not provide international services in the United States are not required to file circuit status reports. *See 2004 Section 43.82 Circuit Status Report*, International Bureau Report, at 4 note 11 (rel. Dec. 22, 2005) (“**2004 Circuit Status Report**”). As a result, the Commission currently is unable to account accurately for nearly 90% of all transoceanic Circuits, which represents nearly 75% of all Circuits. *See id.* at 4 (“[T]he overall reported cable capacity accounted for 12.1% of the total available cable capacity (common carrier and non-common carrier cables), which is approximately the same as last year's ratio.”).

<sup>8</sup> The Commission's recent circuit status reports indicate that between 1997 and 2004 the total number of terrestrial Circuits (*i.e.*, combined active and idle Circuits) increased approximately 1.7 million from 186,644 to 1,899,133 while the total number of satellite Circuits decreased slightly from 38,684 to 21,771. By contrast, the total number of undersea cable Circuits increased by a multiple of over 20 during the same period from 249,203 to 5,729,097—an increase of nearly 5.5 million Circuits. *See 2004 Circuit Status Report; 2000 Section 43.82 Circuit Status Report*, International Bureau Report (rel. June 29, 2001). The industry's increasing dependence on undersea cables is equally reflected if only activated Circuits are considered. Between 1997 and 2004, the number of activated terrestrial Circuits increased approximately 600,000 from 153,267 to 753,397, while the number of activated satellite Circuits decreased slightly from 37,371 to 20,692. By contrast, the number of activated undersea cable Circuits increased by a multiple of nearly 20 from 156,445 to 3,102,906—an increase of nearly three million Circuits. *See id.*

transoceanic Circuit capacity operated by NCC Licensees has increased dramatically over time. Between 1995 and 2004, the total transoceanic Circuit capacity attributed by the Commission to NCC Licensees increased from 22.5% to over 90% of all transoceanic Circuits.<sup>9</sup> Thus, it is overwhelmingly likely that an increasing majority of all activated transoceanic Circuits, which Circuits constitute the substantial majority of all activated Circuits, are operated by NCC Licensees.<sup>10</sup>

Given this rapid increase in transoceanic Circuits operated by NCC Licensees, operators of undersea cables will be saddled over time with an increasing percentage of the Commission's cost to regulate Circuit providers under *any* capacity-based IBC Fee assessment methodology. However, there is no evidence that the cost of regulating satellite and terrestrial Circuit providers is decreasing or that the cost to the Commission of regulating undersea cables is increasing—much less increasing pro rata with the increasing number of cable Circuits. In fact, the cost to the Commission of regulating NCC Licensees most likely has decreased due to the deregulation of NCC Licensees in 2001.<sup>11</sup> At minimum, it seems likely that the cost of regulating common carrier and satellite Circuit providers significantly exceeds the cost of regulating NCC Licensees. Despite this, a capacity-based IBC Fee assessment methodology imposes a disproportionate share of IBC Fee liability on NCC Licensees. Such a result is inconsistent with Congress's intention that no “industry or class of users . . . pay more than their fair share of costs because of industrial growth or success.”<sup>12</sup>

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<sup>9</sup> See *2004 Circuit Status Report*, Table 7.

<sup>10</sup> The Commission does not break down the total number of activated transoceanic Circuits by common carrier and non-common carrier status in its Circuit Status Reports. As a result, it is not possible to determine what percentage of activated transoceanic Circuits are operated by NCC Licensees versus common carrier licensees.

<sup>11</sup> See *Review of Commission Consideration of Applications under the Cable Landing License Act*, Report and Order, 16 FCC Rcd. 22165 (2001).

<sup>12</sup> H.R. REP. NO. 102-207, at 13 (1991).

**B. The Current IBC Fee Regime Causes Disruptive Regulatory Uncertainty to NCC Licensees**

The Commission's existing IBC Fee assessment methodology prevents NCC Licensees from determining with any certainty the amount of IBC Fees that will be imposed on Circuits leased under individual capacity contracts and whether the seller, the buyer, or the buyer's customers ultimately will be responsible each year for the payment of such IBC Fees. This prevents both the submarine cable operator and its customers from accurately predicting and apportioning between themselves the regulatory fees associated with leased capacity, which acts as an obstacle to a fully liquid international capacity market.

Submarine cable capacity tends to be sold by submarine cable operators pursuant to long-term leases (*e.g.*, 2 to 15 years) that specify large upfront payments and much smaller fixed annual payments (*e.g.*, a 3% annual operating fee). Both the seller and the purchaser of cable capacity desire to fix the cost of the capacity at the time that they execute the lease. Such stabilized pricing facilitates an active and efficient international capacity market. Because it often is not possible to determine in advance which entity will be required to pay IBC Fees (*i.e.*, the seller or the buyer, or the buyer's customers) or how much the IBC Fees will be year-to-year, the future stream of annual fees cannot be effectively discounted by NCC Licensees and incorporated into the price of a capacity lease. Specifically, it generally is not possible for NCC Licensees to predict applicable IBC Fees for the reasons set forth below.

- Identity of the Party Responsible for Payment of IBC Fees. It is difficult, if not impossible, to ascertain upon the execution of a Circuit lease who will be responsible to pay the IBC Fees in any given year during the lease term. Commission rules generally require NCC Licensees to pay IBC Fees for Circuits directly utilized by the Non-Common Carrier Licensee or that are leased to a non-Section 214 lessee customer. However, if the Circuits are leased to a lessee that holds a Section 214 authorization (*i.e.*, a common carrier) or are resold by a non-Section 214 lessee to an end user that is a Section 214 holder, then the IBC Fees are required to be paid by the Section 214 holder. NCC Licensees often have no knowledge of the nature of the use of leased Circuits by their lessee customers or the Circuit's ultimate end user. Further, the regulatory status of a lessee and/or the ultimate end users of a resold Circuit may change during the term of a long-term lease. For example, a lessee that does not hold a Section 214 authorization

when it executes a Circuit lease may later obtain one or may resell Circuits during portions of the lease term to different end users, some of which hold Section 214 authorizations and others of which do not.

- Cost of Regulatory Fees. The Commission modifies its schedule of regulatory fees on an annual basis. As a result, it is not possible to predict prospectively the applicable IBC Fees for each year of a long-term lease.
- Active Status of Circuits. Carriers frequently lease Circuits for disaster recovery purposes. Although such carriers may deploy the equipment necessary to use these Circuits in case of emergency, such Circuits may not actually be utilized absent such an emergency. In addition, some customers of a Non-Common Carrier Licensee may never activate a portion of the Circuits leased by the customer or may only activate the Circuits for a limited time period during the lease term. In each of these circumstances, it may be difficult for the Non-Common Carrier Licensee to accurately categorize such Circuits as “activated” or “inactive” for purposes of calculating IBC Fee liability.

This inability to predict IBC Fee liability on a prospective basis has proven to be a substantial obstacle when negotiating submarine cable lease transactions. Efforts by NCC Licensees to pass through IBC Fees to their non-common carrier customers are a recurring source of friction during negotiations. However, because IBC Fees often constitute a substantial portion of total lease costs under the existing IBC Fee regime, NCC Licensees must nevertheless negotiate such a pass through of IBC Fees. Failure to do so exposes the Non-Common Carrier Licensee to the risk that a capacity lease transaction will result in a substantial net loss.

### **C. Capacity-Based IBC Fees Are a Disincentive to Cable Upgrades and Deployment**

The Commission’s current capacity-based IBC Fee regime creates a significant disincentive for submarine cable licensees to build new, or upgrade existing, cable systems. For example, if a licensee doubles its cable’s capacity through a technology upgrade, that licensee’s IBC Fee obligations also nearly will double even though the Commission’s regulatory costs do not change as a result of the technology upgrade. Similarly, a new, high-capacity submarine cable will immediately suffer from a commercial disadvantage in relation to older, lower capacity submarine cables that incur much lower IBC Fees even though the new cable costs no more to regulate.

## II. SECTION 9(B)(3) OF THE ACT AUTHORIZES THE COMMISSION TO AMEND THE REGULATORY FEE SCHEDULE AS APPLIED TO NON-COMMON CARRIER SUBMARINE CABLE LANDING LICENSEES

Section 9 of the Act requires the Commission to assess and collect regulatory fees to recover its regulatory costs for enforcement, policy and rulemaking, user information, and international activities.<sup>13</sup> The Commission is required to adjust the amount of its regulatory fee schedule on an annual basis to ensure that the total amount of fees to be collected for the upcoming fiscal year will equal the amount required to be collected by the applicable Congressional appropriations bill for that year.<sup>14</sup> The Commission also, however, is required to amend its regulatory fee schedule if it determines that, due to a rulemaking or change of law, there is no longer a reasonable relationship between a particular regulatory fee and the benefits of the services provided by the Commission to payors of that regulatory fee.<sup>15</sup>

With respect to this latter requirement, Section 9(b)(3) of the Act states that “the Commission *shall*, by regulation, amend the Schedule of Regulatory Fees set forth in Section 9(g) (“*Schedule*”) if the Commission determines that the Schedule requires amendment to comply with the requirements of paragraph (1)(A).”<sup>16</sup> Paragraph (1)(A), in turn, states that regulatory fees must be assessed “by determining the full-time equivalent number of employees performing the [enforcement, policy and rulemaking, user information, and international activities]. . . , adjusted to take into account factors that are reasonably related to the benefits provided to the payor of the fee by the Commission’s activities.”<sup>17</sup> If an amendment to the Schedule is required to comply with paragraph (1)(A), the Commission must “add, delete, or reclassify services in the Schedule to reflect additions, deletions, or changes in the nature of its

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<sup>13</sup> 47 C.F.R. § 159(a)(1).

<sup>14</sup> 47 C.F.R. § 159(b)(2).

<sup>15</sup> 47 C.F.R. § 159(b)(3).

<sup>16</sup> *Id.* (emphasis added).

<sup>17</sup> 47 C.F.R. § 159(b)(1)(A).

services as a consequence of Commission rulemaking proceedings or changes in the law.”<sup>18</sup> In sum, Section 9(b)(3) *requires* the Commission to add, delete, or reclassify services in the schedule of regulatory fees whenever it determines that, due to a rulemaking or change of law, there is no longer a reasonable relationship between a particular regulatory fee and the benefits of the services provided by the Commission to payors of the fee.

In fact, the services provided by the Commission to NCC Licensees have changed as a result of at least three separate rulemakings and changes in law: (1) the effectiveness of the U.S. commitments in basic telecommunications under the World Trade Organization General Agreement on Trade in Services and the Commission’s implementation of these commitments in its *Foreign Participation Order*; (2) the Telecommunications Act of 1996 and the Commission’s related streamlining of various international Section 214 rules; and (3) the Commission’s submarine cable streamlining rulemaking.<sup>19</sup> Thus, the Commission is not only justified but also required under Section 9(b)(3) of the Act to amend the Schedule.

Moreover, the Commission previously has recognized its obligation to amend its interpretation of the Schedule based upon a rulemaking proceeding that changed the nature of the services it provided to licensees subject to its jurisdiction.<sup>20</sup> Specifically, the Commission determined that, as a result of a number of rulemaking proceedings relating to non-common carrier satellite providers and an expansion of services offered by such providers, the Commission was required to expend greater resources to oversee the commercial activities of

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<sup>18</sup> 47 C.F.R. §159(b)(3).

<sup>19</sup> See Letter to Mr. David Krech, International Bureau, Federal Communications Commission, from Mr. Kent D. Bressie, Mr. Christopher J. Wright, and Mr. Charles D. Breckinridge, Counsel for Tyco Telecommunications (US) Inc. (filed Dec. 15, 2004).

<sup>20</sup> See, e.g., *Assessment and Collection of Regulatory Fees for Fiscal Year 1997*, MD Docket No. 96-186, FCC 97-215, at ¶¶ 66-72 (1997) (“**1997 Fee Order**”); *Assessment and Collection of Regulatory Fees for Fiscal Year 1998*, MD Docket No. 98-36, FCC 98-115, at ¶¶ 57-63 (1998) (“**1998 Fee Order**”).

such providers and thus imposed IBC fees on such providers.<sup>21</sup> Prior to this action, the Commission did not interpret the reference in the Schedule to “international circuits” to apply to non-common carrier satellite licensees.

On appeal, the United States Court of Appeals for the District of Columbia Circuit (“*D.C. Circuit*”) upheld the Commission’s decision concluding that Section 9(b)(3) authorized the Commission to impose IBC Fees on Circuits offered by non-common carrier satellite providers. According to the D.C. Circuit, the Commission’s new interpretation of the Schedule was justified because it was based on “changes in the Commission’s services that flow from earlier rulemakings.”<sup>22</sup> Thus, the D.C. Circuit’s decision makes clear that the Commission is authorized under Section 9(b)(3) to modify the Schedule whenever a rulemaking or change in the law has resulted in changes to its regulatory activities with respect to a particular service.<sup>23</sup>

Further, the Commission also previously has recognized that the Schedule does not restrict the Commission's discretion to modify the methodology used to assess regulatory fees from particular regulated entities. Section 9(g) expressly states that the Commission shall assess and collect regulatory fees pursuant to the Schedule “[u]ntil amended by the Commission pursuant to subsection (b).” As discussed above, subsection (b) requires the Commission to modify the Schedule under certain delineated circumstances. The Commission has not hesitated in the past to modify the Schedule pursuant to Section 9(g)’s mandate. For example, the

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<sup>21</sup> *1997 Fee Order*, at ¶ 71; *1998 Fee Order*, at ¶¶ 61-63.

<sup>22</sup> *PanAmSat Corporation v. FCC*, 198 F.3d 890, 898 (D.C. Cir. 1999).

<sup>23</sup> Section 9(b)(3) states that “[i]ncreases or decreases in fees made by amendments pursuant to this paragraph shall not be subject to judicial review.” 47 C.F.R. § 9(b)(3). In *Comcast Corporation v. FCC*, the D.C. Circuit determined that this statutory provision limits the courts’ jurisdiction over decisions made by the Commission under Section 9(b)(3). *See Comcast Corporation v. FCC*, 114 F.3d 223 (1997). Specifically, the D.C. Circuit determined that a court has jurisdiction to review a Commission decision to amend the Commission’s Schedule only if that decision is premised upon something other than a rulemaking or change in law. If, however, such decision is based on changes in the services provided by the Commission resulting from a rulemaking or change in law, the Commission’s decision is precluded from judicial review, regardless of the nature of the decision.

Schedule specifies the following regulatory fee assessment methodologies “Inter-Exchange Carrier (per 1,000 presubscribed access lines” and “Local Exchange Carrier (per 1,000 access lines).” Despite this language, the Commission determined to assess regulatory fees from interexchange carriers and local exchange carriers as a percentage of gross telecommunications revenue rather than based on the number of access lines controlled by the carrier as specified in the Schedule.<sup>24</sup> Similarly, in the instant case the Commission should not consider itself to be constrained by the reference in the Schedule to assessing IBC Fees based on 64 kbps circuits. The Commission has demonstrated that it has the authority to deviate from the assessment methodology when as in the instant situation circumstances warrant such a modification.

### **III. CONCLUSION**

For the reasons set forth above, FLAG respectfully urges the Commission to act expeditiously to amend its current IBC Fee assessment methodology as applied to NCC Licensees in order to resolve the shortcomings of this methodology discussed herein. The Commission not only has the authority to reform the existing IBC Fee regime but, in fact, is required under Section 9 of the Act to do so. VSNL’s proposals in the Petition are a reasonable solution,<sup>25</sup> and FLAG accordingly supports VSNL’s Petition.

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<sup>24</sup> See *In the Matter of Assessment and Collection of Regulatory Fees for Fiscal Year 1995 Price Cap Treatment of Regulatory Fees Imposed by Section 9 of the Act*, Report and Order, 10 FCC Rcd 13512, ¶¶ 134-135 (1995) (“A revenue-based allocation will effectively spread the cost recovery burden of the fee requirement in proportion to the benefits realized by those carriers subject to our jurisdiction.”).

<sup>25</sup> See Petition, at 7-9 (recommending that the Commission modify its current IBC Fee regime by (1) creating a new IBC Fee category for NCC Licensees; (2) allocating a portion of the Circuit revenue requirement to this new category based on the actual cost to the Commission of regulating NCC Licensees; and (3) recovering this revenue through a flat, annual fee per cable system fee).

Respectfully submitted,

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March 17, 2006

## **CERTIFICATE OF SERVICE**

I, hereby certify that on March 17, 2006, a copy of the foregoing pleading was served by email upon the following party:

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